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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

Estate of NORMIDA SERQUINA, Deceased. SERGUNDO SERQUINA, as Administrator, et al., Plaintiffs and Appellants, v. MICHAEL MONCUR, et al., Defendants and Respondents.	A123858 (Contra Costa County Super. Ct. No. C0600420)

On the morning of March 13, 2004, Michael Moncur finished his shift at Crogan's Bar & Grill, Inc., dba Crogan's Sport's Bar & Grill (Crogan's or the bar) in Walnut Creek. After drinking a 12-ounce beer at the bar, Moncur drove to Antioch, where he attended a "hot tub party" and consumed more drinks. He left the party at approximately 3:45 a.m. and began to drive home. On his way home, his car struck Normida Serquina's car and killed her.[1]

[1] Moncur was charged with, among other things, vehicular manslaughter while intoxicated (Pen. Code, § 191.5). He was convicted and spent approximately one year in state prison. At his deposition, Moncur testified he was convicted of "DUI with grave bodily injury, which is a felony charge." The abstract of judgment in the criminal case is not part of the record on appeal.

Serquina's decedents, plaintiffs Segundo Serquina, Rosechily Serquina, and the Estate of Normida Serquina (plaintiffs) filed a wrongful death action against Moncur, Crogan's, and Ralph Kaine, then the manager of Crogan's. Plaintiffs alleged a claim for negligence, which included a negligence per se theory of liability, as well as claims for negligent operation of a motor vehicle and premises liability.

Crogan's and Kaine (collectively, defendants) moved for summary judgment, contending: (1) they were immune from liability pursuant to Business & Professions Code section 25602;[2] (2) they were not liable under the doctrine of negligence per se; and (3) plaintiffs could not establish defendants' actions were the proximate cause of the accident that killed Serquina. The trial court granted defendants' motion and entered judgment for defendants.

On appeal, plaintiffs contend the court "ruled incorrectly." Specifically, they argue: (1) "[s]ection 25602 immunity is no bar" to their lawsuit; (2) they "raised a triable issue of fact on every element of negligence per se"; and (3) Serquina's injuries were proximately caused by the risk Crogan's created by serving alcohol to Moncur. Plaintiffs do not challenge the grant of summary judgment on their motor vehicle and premises liability claims.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2006, plaintiffs filed a wrongful death lawsuit against Moncur and defendants. The complaint alleged a claim for negligence — which included a negligence per se theory of liability — as well as causes of action for motor vehicle and premises liability. The negligence claim alleged: (1) defendants provided alcohol to

[2] Unless otherwise noted, all further references are to the Business and Professions Code. Section 25602, subdivision (b) provides: "No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage."

Moncur after 2:00 a.m. in violation of sections 25631 and 25632 knowing he planned to operate a motor vehicle; (2) Moncur "became intoxicated and unfit to drive"; as a result of "the post 2:00 a.m. consumption of alcohol;" and (3) Moncur drove his vehicle from the bar and struck Serquina's car, killing her.

Defendants' Motion for Summary Judgment

Defendants moved for summary judgment. They contended summary judgment was appropriate because section 25602 provided immunity as a matter of law. They also contended plaintiffs could not establish the elements of a negligence per se claim. Finally, they argued plaintiffs could not establish a causal connection between the events at Crogan's and the accident that killed Serquina.

Defendants alleged the following facts in their separate statement of undisputed facts: [3]

In March 2004, Moncur worked part-time as a security guard at Crogan's, a Walnut Creek bar owned by Patty Wilkinson. His shift ended at approximately 1:30 a.m. on March 13, 2004. Between 1:30 a.m. and 1:35 a.m., he "clocked out" and drove to a

[3] The parties agreed to use the superior court file in lieu of a clerk's transcript. (See Cal. Rules of Court, rule 8.128 and Local Rule 8.) The parties' citations to the superior court file, however, are woefully inadequate. For example, plaintiffs refer to the separate statement of material facts they submitted in opposition to defendants' motion for summary judgment, but they do not cite to the Bates-stamped page numbers of the superior court file. Plaintiffs' separate statement refers to evidence spanning hundreds of pages. Defendants' references to the superior court file are equally opaque.

" 'It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations.' " (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 850; see also Cal. Rules of Court, rule 8.204(a)(1)(C).) The parties' inadequate citations have hampered our review but have not prevented us from addressing the merits of the appeal. While we elect not to impose sanctions, we admonish counsel to pay careful attention to California Rules of Court, rule 8.204(a)(1)(C) when preparing future briefs. This court will reject future briefs that do not comply with the Rules of Court. (Cal. Rules of Court, rule 8.204(e).)

nearby Safeway, where he purchased a sandwich, apple liqueur, Crown Royal whiskey, and cranberry juice. He ate his sandwich in his car and returned to Crogan's.

When Moncur returned to Crogan's, Kaine, then the manager, served him a 12-ounce Bass ale. Kaine occasionally purchased one alcoholic drink for Crogan's employees between 1:45 a.m. and 2:00 a.m. Moncur finished the drink by 2:00 a.m, within 30 minutes of finishing his shift.[4] He did not drink any other alcoholic beverages at Crogan's.

While he was at Crogan's, Moncur talked to Jason Newcomer about going to Newcomer's house in Antioch "for drinks and to go in the hot tub." The event at Newcomer's house was not sponsored or affiliated in any way with Crogan's. Moncur left Crogan's between 1:55 a.m. and 2:15 a.m. and drove to Newcomer's house. He had two "Washington Apples" —a drink "made with one part Crown Royal, one part Apple [liqueur], [and] one part cranberry juice" — at Newcomer's house but he did not go into the hot tub. Moncur left Newcomer's house around 3:45 a.m. and began to drive home.

At approximately 4 a.m., Moncur was driving along West Leland Road in Pittsburg when he crashed into Serquina's car and killed her. Moncur's blood alcohol level at the time was .13. Police searched Moncur's car and found a half-empty 1.75 liter bottle of Crown Royal whiskey, a nearly empty 750-milliliter bottle of Sour Apple Pucker schnapps, and a flask half full of Crown Royal whiskey.

Plaintiffs' Opposition

In their opposition to the motion for summary judgment, plaintiffs contended section 26502 did not provide defendants with immunity because their claim for negligence was premised on respondeat superior and because Moncur was drinking within the scope of his employment. To support this argument, plaintiffs focused heavily

[4] At his deposition, Kaine denied serving Moncur a beer on March 13, 2004. Pittsburg Police Officer Cranston determined Moncur drank the beer at Crogan's some time between 1:30 a.m. and 2:15 a.m.

on Kaine's practice of buying a drink for Crogan's employees after they finished their shift. Plaintiffs noted that Moncur took advantage of the free drink about five or six times over the course of his four-month employment at Crogan's.

Plaintiffs also argued that Crogan's drinking within the scope of his employment created a foreseeable risk of injury to the general public and proximately caused Serquina's death. To support this argument, plaintiffs relied exclusively on the declaration of their toxicology expert, Kenneth Mark. In his declaration, Mark opined "the twelve-ounce Bass Ale consumed by Mr. Michael Moncur at Crogan's . . . very likely contributed to his blood alcohol level at the time of the traffic collision which resulted in the death of . . . Serquina."

He determined the contribution of a 12-ounce beer to Moncur's blood alcohol level "would be approximately 0.022%." Mark explained, "Because this beverage was consumed after just eating a sandwich absorption [sic] the alcohol into the blood stream, and therefore elimination, will be delayed. Under such circumstances peak blood alcohol level could be expected to occur one to one and one half hours after consumption. Since this beverage was consumed nominally at 2:00 a.m. the peak blood level would occur at roughly 3:00 a.m. to 3:30 a.m. This would place it in the blood stream at the time the "Washington Apple" drinks would start to be absorbed. The significance of this is that the liver would be occupied with the elimination of the alcohol from the Bass Ale and could not act upon the alcohol from the 'Washington Apple' drinks. Since the contribution of the Bass Ale would be approximately 0.02%, Mr. Moncur's blood alcohol level at 4:12 a.m., the time of the traffic collision, would be elevated by this contribution." After describing the relationship between "blood alcohol level and accident causation," Mark averred "the amount of alcohol to which Michael Moncur admit[ted]" drinking on March 13, 2004 was "insufficient to reach a blood alcohol level of .13."

Next, plaintiffs contended defendants were negligent per se because they violated sections 25631 and 25632[5] by providing Moncur with an alcoholic beverage after 2 a.m. To support this argument, plaintiffs offered the declaration of their investigator, Diane Rae, who reenacted Moncur's trip from Crogan's to Safeway and back to Crogan's on March 13, 2004. Rae averred she left Crogan's at 1:30 a.m. and returned at 1:55 a.m. According to plaintiffs, Rae's declaration demonstrated Moncur did not begin drinking the beer at Crogan's until some time after 1:55 a.m.[6]

Defendants' Reply

In their reply, defendants argued they were entitled to summary adjudication on plaintiffs' negligence claim because plaintiffs could not create a triable issue of fact regarding causation. They also contended they were entitled to summary adjudication on plaintiffs' negligence per se theory of liability because, among other things, plaintiffs could not prove they violated sections 25631 and 25632 and because plaintiffs could not establish Moncur's consumption of alcohol at Crogan's was the proximate cause of the accident that killed Serquina.

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[5] Section 25631 provides: "Any on- or off-sale licensee, or agent or employee of that licensee, who sells, gives, or delivers to any persons any alcoholic beverage or any person who knowingly purchases any alcoholic beverage between the hours of 2 o'clock a.m. and 6 o'clock a.m. of the same day, is guilty of a misdemeanor." Section 25632 provides: "Any retail licensee, or agent or employee of such licensee, who permits any alcoholic beverage to be consumed by any person on the licensee's licensed premises during any hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption on the premises is guilty of a misdemeanor."

[6] In their response to plaintiffs' separate statement of undisputed facts, defendants objected to Rae's declaration on the grounds that it lacked foundation and was irrelevant. They did not file written objections (Cal. Rules of Court, rules 3.1352, 3.1354) nor secure a ruling to preserve these objections for appeal. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 579; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1, superseded by statute on another point as stated in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768 (*Saelzler*).) As a result, Rae's declaration is part of the record on appeal.

The Order Granting Summary Judgment

Following a hearing, the court granted defendants' motion for summary judgment. The order provided: "Crogan's and Kaine are immune from civil prosecution for serving Moncur alcoholic beverages under . . . Section 25602. Even assuming that Plaintiffs were able to create an issue of fact that Defendants had violated . . . Sections 25631 and 25632, which the Court does not believe they have, there is no private right of action pursuant to those statutes. Power to regulate the distribution of alcoholic beverages is vested entirely in the State. . . . Plaintiffs have not established that negligence per se follows from a violation of those statutes. . . .

"Furthermore, there is no genuine issue of material fact that the beer served to Defendant Moncur by Defendant Kaine at the end of his shift at Crogan's . . . was not the proximate cause of the fatal accident that took place hours later. Plaintiffs' own expert has testified that the beer could have caused Moncur's blood alcohol content to rise no more than 0.022% between 3:00 a.m. and 3:30 a.m., about one-half hour before the accident. It was Moncur's ingestion of more alcohol after he left Crogan's, that was not served to him by Kaine or Crogan's or any of their agents, that caused him to become intoxicated and led to the accident and to the death of Plaintiffs' decedent. Accordingly, summary judgment against Plaintiffs and in favor of these Defendants is appropriate."

Plaintiffs timely appealed.

DISCUSSION

Standard of Review

"Because plaintiffs appealed from the trial court's order granting defendants summary judgment, we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action. [Citation.] 'To prevail on [an] action in negligence, plaintiff[s] must show that defendants owed [them] a legal duty, that they breached the duty, and that the breach was a proximate or legal cause of [their] injuries.' [Citations.] [T]he amendments to Code of Civil Procedure section 437c . . . place the

initial burden on the defendant moving for summary judgment and shift it to the plaintiff upon a showing that the plaintiff cannot establish one or more elements of the action. [Citation.]

"In this action, therefore, we must determine whether defendants have shown that plaintiffs have not established a prima facie case of negligence, 'a showing that would forecast the inevitability of a nonsuit in defendants' favor. If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.' [Citations.]

"In performing our de novo review, we view the evidence in the light most favorable to plaintiffs as the losing parties. [Citation.] In this case, we liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor. [Citation.]" (*Weiner v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; see also *Saelzler, supra,* 25 Cal.4th at p. 767.)

Employer Liability Under the Respondeat Superior Theory

As noted above, the court granted summary judgment for defendants on plaintiffs' negligence claim, concluding: (1) defendants were immune from liability pursuant to section 25602; and (2) plaintiffs had failed to raise a triable issue of material fact regarding causation. Plaintiffs challenge both of these conclusions on appeal. They contend "[s]ection 25602 immunity is no bar to this suit," and that "Serquina's injuries were proximately caused by the risk Crogan's created."

To place the issues in context, we briefly discuss section 25602 immunity and the theory of respondeat superior liability. Subject to one statutory exception not relevant here, section 25602, subdivision (b) provides " 'sweeping civil immunity' from liability for injuries to third persons resulting from the furnishing of alcohol to another." (*Hernandez v. Modesto Portuguese Pentecost Association* (1995) 40 Cal.App.4th 1274, 1281, quoting *Strang v. Cabrol* (1984) 37 Cal.3d 720, 724.) "Section 25602 generally

immunizes an establishment from liability for injuries to third parties resulting from the furnishing of alcohol to its patrons, permitting its patrons to consume alcoholic beverages on the premises, or for failing to prevent or prohibit its patrons from drinking alcoholic beverages and encouraging the use of its premises for drinking." (*Cantwell v. Peppermill, Inc.* (1994) 25 Cal.App.4th 1797, 1801.)

Here, plaintiffs contend section 25602 does not immunize defendants from liability because their negligence claim is based on respondeat superior liability. They are correct that section 25602 "has no effect on respondeat superior liability because that liability . . . is premised on a sufficient showing that the employee's consumption was within the scope of employment, rather than on the employer's giving [or] selling . . . alcohol to another." (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency, § 180, p. 228; see also *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 808 (*Childers*); *Harris v. Trojan Fireworks Co.* (1981) 120 Cal.App.3d 157, 160-161; *Rodgers v. Kemper Construction* Co. (1975) 50 Cal.App.3d 608, 617.)

"The doctrine of respondeat superior imposes vicarious liability on an employer for the torts of an employee acting within the scope of his or her employment, whether or not the employer is negligent or has control over the employee. [Citations.] As a matter of policy it is considered fair to allocate to the costs of doing business a loss resulting from a risk that arises in the context of the employment enterprise. [Citation.] ' " '[W]here the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" *to the enterprise undertaken by the employer*. [Citation.]' [Citation.] Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include *risks inherent in or created by the enterprise*." ' [Citations.]" (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 160.)

Plaintiffs rely heavily on *Childers*, where the Third District Court of Appeal held an employer liable under a respondeat superior theory for injuries suffered as a result of

an employee's consumption of alcohol within the scope of her employment. (*Childers, supra*, 190 Cal.App.3d at p. 798.) In *Childers*, the foreman of an auction yard gave his set of keys to two employees, Vern Smith and Toni JoAnn Abbott, as he left work so Smith and Abbott could "be in charge of the yard the next day." (*Id.* at p. 799.) The foreman told the two employees to " 'Go have a beer.' " The employees understood this statement to mean they could obtain the beer from the foreman's office. It was a "regular practice" for the foreman "to furnish alcoholic beverages on the premises to customers of the auction yard" and most of the yard's employees "had consumed alcoholic beverages" in the foreman's office; Abbott drank alcoholic beverages at the auction yard at least 10 times with the knowledge, permission, and participation of management. (*Ibid.*) Smith, Abbott, and another employee went to the foreman's office, obtained six packs of beer, and began drinking. Later, a customer joined them and they drank hard liquor. (*Id.* at p. 799.) Several hours later, Smith and Abbott left the auction yard in Abbott's truck to feed Abbott's horses. Abbott drove off of the road, killing herself and injuring Smith. The trial court granted the auction yard's motion for summary judgment. (*Id.* at p. 798.)

On appeal, the *Childers* court considered the doctrine of respondeat superior liability. The court noted that "[s]everal California cases have allowed nonemployee third parties to recover from employers for the tortious conduct of employees, where the tortious conduct was a foreseeable risk of the employee's consumption of alcohol occurring after ordinary working hours but within the scope of employment." (*Childers, supra*, 190 Cal.App.3d at p. 803.) The court then determined that an employee's activities occur within the course and scope of employment when the activities: (1) are undertaken with the employer's permission; (2) benefit the employer; and (3) are a customary incident of employment. (*Id.* at p. 804.) The court also noted, however, that "[s]o long as the risk is created within the scope of the employee's employment, the scope of employment must follow the risk so long as it acts proximately to cause injury." (*Id.* at p. 805.)

The *Childers* court determined that Abbott consumed alcohol within the scope of her employment because the activity: (1) "was undertaken with the [auction yard's] permission;" (2) benefitted the auction yard; and (3) was a customary incident of Abbott's employment. (*Childers, supra,* 190 Cal.App.3d at pp. 805-806.) The court also determined that "Abbott's subsequent negligent driving was a clearly foreseeable risk of her consumption of alcohol and, therefore, of [the auction yard's] business enterprise." (*Id.* at p. 806.)

According to plaintiffs, Moncur's consumption of alcohol at Crogan's — like the employees in *Childers* — occurred within the scope of his employment. Even if we assume for the sake of argument that Moncur was acting within the scope of his employment when he drank one beer at Crogan's, defendants are entitled to summary judgment unless plaintiffs can create a triable issue of fact that Moncur's consumption of one alcoholic beverage at Crogan's proximately caused Serquina's death. As noted above — and as plaintiffs concede — Crogan's is liable for negligence under a respondeat superior theory only where the "the risk [that] is created within the scope of the employee's employment . . . acts proximately to cause injury." (*Childers, supra,* 190 Cal.App.3d at p. 805.)

" 'The elements of a cause of action for negligence are well established. They are "(a) a legal *duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury." ' " (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917, original italics, quoting *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834.) "To establish the element of actual causation, it must be shown that the defendant's act or omission was a substantial factor in bringing about the injury." (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752 (*Padilla*).)

In the trial court, plaintiffs relied on their expert, Mark, to attempt to establish the causal relationship between the beer Moncur drank at Crogan's and the accident. As

noted above, Mark determined the contribution of a 12-ounce beer to Moncur's blood alcohol level "would be approximately 0.022%" and that Moncur's "blood alcohol level at 4:12 a.m., the time of the traffic collision, would be elevated by this contribution." Mark also opined that "the addition of 0.02%" to Moncur's blood alcohol level was "substantial in accident causation."

Mark's opinion that the one beer Moncur drank at Crogan's was "substantial" or significant stems from his conclusion it would have added .022 to Moncur's blood alcohol. But Mark admitted the blood alcohol level from that beer would have peaked between 3:00 p.m. and 3:30, well before the accident, which meant that the blood alcohol level contribution from that beer at the time of the accident was well below .022. How much below is impossible to say because Mark did not extrapolate what the blood alcohol level from that one beer would have been at 4:12 a.m. Mark conceded that alcohol is eliminated from the blood stream but he did not explain the rate of elimination, nor did he opine on what Moncur's blood alcohol level would have been when he began drinking at Newcomer's house or at the time of the traffic collision. As a result, Mark's conclusions are insufficient to create a triable issue of fact that the beer Moncur consumed at Crogan's was a substantial factor in bringing about Serquina's death. (See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1186, p. 553.)

Where, as here, "there is evidence that the harm could have occurred even in the absence of the defendant's negligence, 'proof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence. . . .' " (*Padilla, supra*, 160 Cal.App.4th at p. 752, quoting *Saelzler, supra*, 25 Cal.4th at p. 775.) Because defendants established plaintiffs could not prevail on the necessary element of causation, the court properly granted summary judgment on plaintiffs' negligence claim.

Liability Pursuant to the Negligence Per Se Doctrine

As discussed above, plaintiffs based their negligence claim on theories of common law negligence action and negligence per se. Evidence Code section 669 codifies the doctrine of negligence per se. (6 Witkin, *supra*, Torts § 873, p. 102; *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1306 (*Daum*) ["negligence per se doctrine . . . is codified by Evidence Code section 669"].) Pursuant to Evidence Code section 669, the defendant's failure to exercise due care is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation caused the plaintiff's injury; (3) the injury resulted from an occurrence the statute or regulation was designed to prevent; and (4) the plaintiff was one of the class of persons the statute or regulation was designed to protect. (*Daum, supra*, at p. 1306; Cal. Evid. Code, § 669, subd. (a)(1)-(4).)

In their complaint, plaintiffs contended defendants must be presumed negligent because they violated sections 25631 and 25632, which make it a misdemeanor to sell, give, deliver, or permit consumption of alcoholic beverages between 2 a.m. and 6 a.m. (§§ 25631, 25632; *Sanita v. Board of Police Comrs.* (1972) 27 Cal.App.3d 993, 995, fn. 2.) The trial court disagreed and granted defendants' motion for summary judgment, concluding, among other things: (1) plaintiffs did not establish defendants violated sections 25631 and 25632; (2) assuming defendants did violate sections 25631 and 25632, they could not establish that "negligence per se follows from violation of those statutes"; and (3) plaintiffs failed to establish the beer served to Moncur at Crogan's was the proximate cause of the accident that killed Serquina.

On appeal, plaintiffs contend the grant of summary judgment was erroneous because they "raised a triable issue of material fact on every element of negligence per se." We disagree. Even if we assume Crogan's violated sections 25631 and 25632 — i.e., that Moncur consumed the beer at Crogan's after 2 a.m. — their claim fails because they failed to create a triable issue of fact that these violations caused Serquina's death.

(See *Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1328; *Daum, supra,* 52 Cal.App.4th at p. 1306; 6 Witkin, *supra,* Torts, § 895, p. 127.)

Having reached this result, we need not determine whether plaintiffs have satisfied the remaining elements of a claim for negligence based on a negligence per se theory of liability, specifically, whether Serquina's death resulted from an occurrence sections 25631 and 25632 were designed to prevent and whether Serquina was one of the class of persons the statutes or were designed to protect. (Evid. Code, § 669, subd. (a)(3), (4).)

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.